UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN P. HUSEK,	)	
	)	
Plaintiff	)	
v.	)	Civil No. 94-0289-B
	)	
CITY OF BANGOR, et al.,	)	
	)	
Defendants	)	

ORDER AND RECOMMENDED DECISION

This action arises out of Plaintiff's arrest and subsequent detention in Bangor, Maine, on December 19, 1992. Plaintiff's *pro se* Complaint alleges in Count I, a violation of Plaintiff's Fourth Amendment rights, Count II alleges a violation of Plaintiff's Fifth Amendment (presumably due process) rights, and Count III alleges a violation of Plaintiff's right to be free from cruel and unusual punishment under the Eighth Amendment. Plaintiff's final cause of action alleges emotional distress and seeks punitive damages.

I. The Motion to Amend.

Plaintiff's Complaint originally named the two officers allegedly involved in Plaintiff's arrest as John Doe Numbers One and Two. Plaintiff now seeks to Amend the Complaint to properly name those officers. Defendants object to the Motion to Amend on the grounds that it is untimely. Nevertheless, they move for summary judgment on the assumption that the Motion to Amend will be granted, and we discern no prejudice to them by allowing the amendment in view of our conclusion that the Motion for Summary Judgment should be granted. Accordingly, the Motion to Amend Complaint is hereby GRANTED.

II. The Motion to Enlarge Time.

Defendants filed this Motion for Summary Judgment on November 20, 1995. On December 7, the Court granted Plaintiff's Motion to Enlarge Time to Respond to the Motion for Summary Judgment to December 20, 1995. On December 21, Plaintiff again moved to enlarge to December 30. His response was ultimately filed on January 2, 1996. Pursuant to the Federal Rules of Civil Procedure, Plaintiff bore the burden of showing excusable neglect for his failure to file the response within the time permitted by the Court's Order granting the enlargement. Plaintiff's Motion to Enlarge, however, asserts only that he was still marshaling evidence. Because the Court finds Plaintiff's has not met his burden, the Motion to Enlarge Time is hereby DENIED, and the Response to Defendants' Motion for Summary Judgment is hereby STRICKEN.[1]

III. The Motion for Summary Judgment.

Ordinarily, a party's failure to respond to a motion is generally construed to waive objection to the motion. D. Me. R. 19(c). However, the Federal Rules of Civil Procedure require us to examine the merits of a motion for summary judgment regardless of the opposing party's failure to object. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991). Accordingly, we will examine the merits of Defendants' Motion for Summary Judgment based on Defendants' Statement of Material Facts, which are as follows.

A. Statement of Facts.

On or about December 19, 1992, Officer John Heitmann was performing his routine duties as a member of the Bangor Police Department, when he was notified by dispatch that a suspicious

[1] In any event, Plaintiff's Response asserts only that Defendants may not move for summary judgment when they have not provided Plaintiff with a copy of the warrant forming the basis for Plaintiff's arrest. The existence of a warrant, however, is irrelevant to our analysis on this Motion.

vehicle was operating in and around the parking lot at the Airport Mall. Officer Heitmann observed a white van in the parking lot, and signaled for the van to stop. After the van stopped, Plaintiff John Husek got out of the van.

In the meantime, Officer Heitmann received information from dispatch that there was an active warrant out for the arrest of John P. Husek. Plaintiff identified himself as John Husek, and provided Officer Heitmann with his driver's license. The driver's license indicated Plaintiff's date of birth and residence, which information matched that contained in the arrest warrant. Officer Heitmann placed Plaintiff under arrest.

Officer Heitmann does not specifically recall arresting Plaintiff, but testifies that, in all likelihood, Plaintiff was placed in handcuffs using only so much force as would be necessary under the circumstances. Plaintiff was thereafter transported to the Penobscot County Jail and turned over to the custody of the Penobscot County Sheriff's Department.

Officer Heitmann and the Bangor Police Department thereafter had no further contact with Plaintiff. Officer Paul Edwards of the Bangor Police Department had no contact with Plaintiff at all, and did not participate in Plaintiff's arrest on December 19, 1992.

B. Discussion

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record

on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

1. Defendant Edwards.

There is no evidence in this record that Defendant Edwards had any involvement whatsoever with the activities forming the basis of Plaintiff's Complaint. Accordingly, judgment should be granted in favor of Defendant Edwards on all Counts of Plaintiff's Complaint.

2. Qualified Immunity.

Defendant Heitmann asserts that he is entitled to qualified immunity for his actions relative to Plaintiff's arrest. The doctrine of qualified immunity shields government officers "'from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" *Hegarty v. Somerset County*, 53 F.3d 1367, 1373 (1st Cir. 1995) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). This doctrine provides for the "inevitable reality that 'law enforcement officials will in some cases reasonably but mistakenly conclude that [their conduct] is [constitutional], and . . . that . . . those officials -- like other officials who act in ways they reasonably believe to be lawful -- should not be held personally liable.'" *Id*. (quoting *Anderson*, 483 U.S. at 641).

The qualified immunity inquiry has two prongs. First we must determine whether the right asserted by Plaintiffs was clearly established at the time of the contested events. *Hegarty*, 53 F.3d at 1373. Here there is no dispute that Plaintiff is alleging violations of his clearly established constitutional rights, although these rights may not have been properly identified in the Complaint. There is no need, however, to sort through the source of Plaintiff's rights for purposes of this Motion. This is so because the second step in the inquiry is to determine whether, viewing facts in a light most

favorable to plaintiff, "an *objectively* reasonable officer, similarly situated, *could have believed* that the challenged . . . conduct did *not* violate" Plaintiff's rights. *Id*. (emphasis in original).

There is no question that Defendant Heitmann is entitled to qualified immunity in this case. Defendant arrested Plaintiff on the basis of information he received that there was an active arrest warrant. *See, Krohn v. United States*, 742 F.2d 24, 26-27 (1st Cir. 1984) (facially valid warrants are only subject to challenge to the extent the affidavits supporting them containing "intentional or reckless misrepresentations or misstatements which were necessary" to the finding of probable cause). He did so only after verifying that Plaintiff's demographic information matched that contained in the warrant. *See, Gero v. Henault*, 740 F.2d 78, 84-85 (1st Cir. 1984) ("where there is a facially valid warrant or probable cause for arrest . . . the only question is whether it was reasonable for the arresting officers to believe that the person arrested was the one sought"). Finally, there is no evidence that Defendant utilized more than the minimal force necessary to place Plaintiff in handcuffs.[2]

In short, there is no evidence in this record from which it could be inferred that Defendant violated any of Plaintiff's constitutional rights. Accordingly, he is entitled to qualified immunity on all of Plaintiff's federal claims.

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[2] Plaintiff raises the excessive force claim under the Eighth Amendment prohibition against cruel and unusual punishment. However, it is undisputed that Plaintiff was not convicted of a crime at the time of his arrest. Accordingly, the Eighth Amendment does not apply to this action, and Plaintiff's claim is more appropriately analyzed under the due process clause. *Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239 (1983).

Further, many of Plaintiff's allegations that could be construed as alleging punishment actually involve the conditions of his confinement at the Penobscot County Jail. No official of the Penobscot County Jail is named as a Defendant in this case. These allegations are therefore irrelevant to our determination on this Motion for Summary Judgment.

3. City of Bangor.

Defendant City of Bangor may be held liable for the actions of its officers only if the officers' unconstitutional actions were the result of an official policy or custom of the City. *Monell v. Department of Soc. Serv.*, 436 U.S. 658 (1978). In this case, there is no evidence that a constitutional violation occurred at all, let alone as a result of an official policy or custom. Defendant City of Bangor is entitled to summary judgment.

Conclusion

For the foregoing reasons, I hereby recommend Defendants' Motion for Summary Judgment be GRANTED in its entirety as to Plaintiff's federal claims, and that the Court thereafter decline jurisdiction over Plaintiff's state law tort claim.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on January 16, 1996.